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No. 87-621

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., et al.,
Petitioners,

VS.

FRANCISCAN CERAMICS, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Ninth Circuit properly apply Fed. R. Civ. P. 56 and this Court's precedent in *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986), *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) when it affirmed the District Court's grant of summary judgment in favor of Franciscan Ceramics, Inc.?

2. Did the Ninth Circuit decision in *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987) conflict sufficiently with the Eighth Circuit decision in *United Indus. Syndicates, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982), to invoke this Court's certiorari jurisdiction?

3. Did the Ninth Circuit substantially depart from the accepted and usual course of judicial proceedings in affirming the District Court's denial of leave to amend on the ground of futility?

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 28.1, respondents Franciscan Ceramics, Inc., Josiah Wedgwood & Sons, and Wedgwood plc identify its parent companies, subsidiaries, and affiliates as follows:

Parent Company: Waterford Glass Group plc

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STATEMENT OF THE CASE

This action concerns the conduct of Respondents Franciscan Ceramics, Inc. (Franciscan) and its parent companies Josiah Wedgwood & Sons, Inc. (Josiah) and Wedgwood plc (Wedgwood) (hereinafter collectively referred to as Franciscan) in closing Franciscan's failing ceramic tile production plant in October of 1983. The closure of the Franciscan factory spawned a series of breach of contract, fraud and related actions in California state court between Franciscan and a few non-exclusive tile dealers who had purchased Franciscan ceramic tile for resale to the public and construction trade (the tile dealers). These commercial disputes centered on Franciscan's inability to deliver ordered or advertised ceramic tile due to the closure of the factory and the tile dealers'

failure to pay for tile which had been ordered and received prior to closure.

After conducting substantial discovery in the state court actions, the tile dealers brought this action in federal court on September 20, 1984, alleging violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq. ("RICO"). The RICO complaint, which was amended on October 29, 1984, charged Franciscan with a secret scheme devised on or before May 6, 1983 to close Franciscan's tile plant in September or October of 1983. (E.R. 3, 6-8) The alleged RICO plot contained three main elements: (1) "determining to form a plan for closure" on or about March 31, 1983; (2) a decision "[s]sometime prior to May 6, 1983 . . . to close the Franciscan Tile Plant in September or October of 1983," and, pursuant to this decision, (3) Franciscan's misrepresentations to the tile dealers "that [it] would continue in production, for the purpose of selling off Franciscan's inventory" which would "suffer a significant diminution in value" on closure and thereby "wrongfully shift the diminution in value" to the tile dealers. (E.R. 6-9)

On December 16, 1985, more than one year after the complaint was filed and approximately one month before the scheduled pre-trial conference, the tile dealers moved for leave to amend the First Amended Complaint. The proposed second amended complaint alleged alternatively that Franciscan had schemed to unload inventory by misrepresenting to the tile dealers it "had a plan to stay in business producing tile until at least March of 1984," when in fact it was "actively considering" closure and "knew it would not" continue in production until March 1984. (E.R. 119-122)

Franciscan immediately filed a motion for summary judgment on the ground that no reasonable trier of fact

could conclude that Franciscan had schemed to defraud the tile dealers. Simply put, Franciscan had no intent to defraud because it was genuinely engaged in an effort to keep the company in operation throughout the spring and summer of 1983. Respondents established lack of fraudulent intent on the basis of hundreds of contemporaneous business records, including Wedgwood and Franciscan board minutes and internal correspondence, Franciscan accounting and production records, and a 1983-84 business year plan adopted and implemented by Franciscan management. These unchallenged business records demonstrated that, despite aggressive and expensive efforts made by management to improve sales of ceramic tile, Franciscan suffered over a half million dollars in net operating losses during the first half of the 1983-84 business year and significantly increased its warehouse inventory of ceramic tile. Franciscan was forced to close its doors in October 1983 because of these massive, unforeseen losses. (E.R. 198-209, 228-244, 278-288, 289-299, 302, 305-348, 378-407, 459-460, 472-473, 510, 512, 514-515, 548, 559-560, 571-572)

Respondents further moved for summary judgment on the alternative ground that the evidence did not support a finding that respondents had engaged in a "pattern of racketeering" under RICO.[1] Finally, respondents opposed the tile dealers' motion for leave to amend on grounds of futility, delay, prejudice and bad faith. Respondents demonstrated that the proposed amended complaint was futile because they had presented uncontroverted evidence of Franciscan's adherence to the 1983-84 business year plan until the day the Wedgwood board voted to close. Thus, all the evidence indicated that,

[1]This alternative ground for summary judgment is the subject of a cross-petition for a writ of certiorari to be filed by respondents concurrently with this opposition.

despite respondents' fallback considerations of closure, they were actively pursuing a course of action calculated to assure Franciscan's future.

The district court granted summary judgment and denied leave to amend on the apparent ground that the tile dealers could not establish a pattern of racketeering under RICO because the alleged scheme to close Franciscan constituted only a "single criminal episode."

The Ninth Circuit, reviewing the entire record *de novo*, affirmed the district court's grant of summary judgment holding that no reasonable trier of fact could infer a scheme to defraud the petitioners:

> The record, on the basis of which Franciscan's motion must be judged, reveals that Franciscan never misrepresented its intentions to the dealers. Until the day it closed, Franciscan operated as a going concern. Although Franciscan's management investigated closing as a contingency plan, it did not conduct the business as though closing were likely. Franciscan led the dealers to believe that it intended to stay in business, not to defraud them, but because that was its true intent. Therefore there was no fraud. Franciscan's massive, unforeseen operating losses, which upset its plans and forced it to close, cannot retroactively make fraudulent an intent that was honest during the relevant period.

California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1470 (9th Cir. 1987)

The Ninth Circuit based its holding on the evidence of respondents' numerous and energetic efforts during the spring and summer of 1983 to turn the company around and the lack of any direct proof of a preconceived plan to close. It found that no reasonable inference of fraudulent intent could be drawn from management's statements and

routine business correspondence regarding the future operations of the company. The court concluded that "only an incorrigible optimist could understand [the statements] as either a promise to remain open without regard to sales or as a representation of sound economic health."-*Id.* at 1471.

The Ninth Circuit also affirmed the denial of leave to amend on the ground of futility in light of its finding that Franciscan's statements could not reasonably be construed as a promise to remain open until March of 1984 without regard to sales: "We can add nothing to our explanation why no reasonable trier of fact could conclude that Franciscan's statements had this force." *Id.* at 1472.

REASONS FOR DENYING THE PETITION

I.

The Ninth Circuit Properly Applied Fed. R. Civ. P. 56 In Affirming Summary Judgment In Favor of Respondents.

Petitioners assert that the Ninth Circuit placed an improper burden on them by applying the summary judgment standard enunciated by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). (Petition, at p. 13) Petitioners apparently contend that the *Matsushita* standard was intended only to apply to implausible antitrust conspiracies.[2] Petition-

[2]Even if the tile dealers are correct in asserting that the *Matsushita* holding was designed to address implausible antitrust conspiracies, sufficient parallels between the antitrust laws and RICO exist to support application of the *Matsushita* standard here. As recently recognized by this Court in *Agency Holding Corporation v. Malley-Duff Assoc.*, 107 S. Ct. 2759 (1987), RICO, like the antitrust laws, was designed to remedy economic injury to business and property. More-

ers have offered no support for their contention except to acknowledge that antitrust conspiracies can be economically implausible because the purported conspiratorial practice may serve a legitimate business purpose as well.

Respondents submit that the Ninth Circuit correctly construed and applied *Matsushita* as well as this Court's other recent pronouncements on the standard for summary judgment in *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986) and *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). These summary judgment decisions did not confer on the lower court the power to weigh competing inferences or to determine issues of credibility, as petitioners seem to suggest. Such factual determinations rest exclusively within the province of the jury. Rather, the Court's decisions clarified the evidentiary burden of the plaintiff (as non-moving party) to establish that genuine factual issues may reasonably be resolved in its favor. They further "increased the utility of summary judgment" by confirming the lower court's power to reject implausible or unreasonable inferences proffered by the plaintiff. *Franciscan*, 818 F.2d at 1468. As stated by the Ninth Circuit, "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id.* Only reasonable inferences can withstand such a test.

over, motive and intent are key elements to establishing claims under these statutes. Finally, in determining the inferences which can fairly be drawn from the evidence, courts should consider in both types of cases the chilling impact which implausible inferences will have on the ability to conduct business.

A predetermination of "reasonableness" by the trial court is firmly rooted in Rule 56. In *Liberty Lobby,* this Court defined the trial judge's responsibility in considering summary judgment requests as follows:

> The inquiry performed is the threshold inquiry of determining whether there is a need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Liberty Lobby, 106 S. Ct. at 2511.

This Court further stated that:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . .

Id. at 2512.

In determining what constitutes a reasonable inference, a "court may look to other evidence in the record which tends to make that inference more or less plausible." *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1065 (Temp. Emer. Ct. App. 1978). If "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [people] could not arrive at [but one] verdict," *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969), the court should grant summary judgment.

In *American Tel. & Tel. Co. v. Delta Communications Corp.*, 590 F.2d 100 (5th Cir. 1979), *cert. denied, sub nom. Delta Communications Corp. v. National Broadcasting Co.*,

444 U.S. 926, a panel of the Fifth Circuit Court of Appeals, in a petition for rehearing en banc, was accused of having weighed inferences from established facts instead of indulging every reasonable inference in favor of the party opposing summary judgment. The court, in clarifying the summary judgment standard, stated:

> [I]t is hornbook law that the court must indulge every *reasonable* inference from those facts in favor of the party opposing the motion. Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do.

Id. at 101-02. (Emphasis in original).[3]

Critical to the summary judgment analysis, as recognized in this Court's decisions in *Celotex*, *Liberty Lobby*, and *Matsushita*, is the trial judge's role in making a threshold predetermination of the proferred evidence based on judicial experience and the realities of everyday life. If an inference to be culled from a fact is so far removed from the ordinary, the rational or the reasonable, the trial judge is within his or her discretion to give the inference little weight. The Ninth Circuit in *Franciscan* did precisely that in affirming summary judgment in favor of respondents.

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[3]In continuing, the court opined in anecdote the permissible range of inferences allowed: "If a frog be found in the party punch bowl, the presence of a mischievous guest — but not the occurrence of spontaneous generation — may reasonably be inferred." *Id.* at 102.

Like *Matsushita*, the Ninth Circuit was faced in *Franciscan* with a factually implausible scheme.[4] The uncontroverted evidence showed that Franciscan was inherently incapable of implementing a scheme to unload its tile inventory onto the tile dealers prior to closure. Because a substantial portion of the tile dealers' orders for ceramic tile had to be specially manufactured, Franciscan was required to stay in full production to fill orders. Franciscan could not, as the tile dealers well knew, have surreptitiously shut down its kilns while selling off its warehoused tile to unsuspecting distributors.

Having demonstrated the inherent implausibility of the alleged scheme, respondents went further to negate by substantial circumstantial evidence any reasonable inference of a scheme or "plan" to close the factory. Respondents established through their unchallenged business records that Franciscan not only maintained full production of ceramic tile throughout the spring and summer of 1983, but that it implemented a 1983-84 business year plan that called for substantial capital outlays for, among other things, research and development of new tile, outside technical assistance on production problems, and a mass marketing drive scheduled for the spring of 1984.

In affirming summary judgment, the Ninth Circuit did not, as petitioners contend, weigh "the inference of fraud

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[4]Petitioners' assertion that, by denying Rule 11 sanctions, the Ninth Circuit effectively conceded the economical plausibility of the alleged scheme is completely unfounded. (Petition, at p. 20). In reviewing respondents' request for Rule 11 sanctions, the Ninth Circuit only looked at whether counsel had a colorable claim at *the time of filing the complaint*. The fact that a colorable claim was presented at the commencement of suit is irrelevant at the summary judgment stage when the plaintiff has had a full opportunity to conduct discovery and must come forward with significant, probative evidence of the alleged scheme. *See Liberty Lobby*, 106 S. Ct. at 2511.

against inferences . . . that Franciscan was operating on a going concern basis." (Petition, at p. 21). Rather, it heeded the advice of the Fifth Circuit in *American Tel. & Tel. Co.*, Id. at 101-02, by measuring the overwhelming and *uncontroverted* evidence of Franciscan's operation as a going concern against an abstract standard of reasonableness. It properly assessed the economic realities in finding that no reasonable trier of fact could infer from the evidence that respondents had fraudulently misrepresented Franciscan's business plans. In short, "Franciscan led the dealers to believe it intended to stay in business, not to defraud them, but because that was its true intent." *Franciscan*, 818 F.2d at 1470.

Given the overwhelming evidence of Franciscan's good faith, the Ninth Circuit was correct in holding that "the evidentiary burden of the dealers is heavy." *Id.* Because the barometer of abstract reasonableness plunged toward the improbable, more probative evidence than would otherwise have been necessary was required to return it to a threshold of reasonableness. *Matsushita,* 106 S. Ct. at 1356. The tile dealers' mere conjectures and fantasies of a scheme to close Franciscan in order to dump inventory failed to discharge that burden. Summary judgment was therefore warranted.

II.

The Ninth Circuit Decision In *Franciscan* Is Not In Conflict With The Eighth Circuit Decision In *Western Auto.*

Petitioners contend as a peripheral basis for jurisdiction that the Ninth Circuit's decision in *Franciscan* conflicts with the Eighth Circuit's holding in *United Indus. Syndicate v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982). In *Western Auto*, the Eighth Circuit reversed the district court's grant of summary judgment in favor of

the defendant in a breach of contract and common law fraud action involving the termination of a supplier-retailer relationship. The court found that fact issues existed as to whether the retailer had a duty to disclose its decision to terminate the business relationship or affirmatively defrauded the supplier into believing that the relationship would continue.

Western Auto does not conflict with the Ninth Circuit's decision below because the Eighth Circuit's findings hinged on critical evidentiary issues which were not present in Franciscan. Moreover, Western Auto was decided prior to this Court's rulings in *Celotex*, *Liberty Lobby*, and *Matsushita* and therefore did not benefit from the guidance provided by these decisions in assessing the non-moving party's evidentiary burden under Fed. R. Civ. P. 56.

In *Western Auto*, the plaintiff-retailer presented substantial, probative evidence of an oral agreement between the parties which required the defendant-supplier to provide six months advance notice of an intent to terminate the business relationship. This key fact, the court found, supported an inference that the retailer had affirmatively induced the supplier to rely on expectations of a continued business relationship. *Western Auto*, 686 F.2d at 1318.

Without this key evidence of an oral agreement, the court could not have reversed summary judgment on the intentional misrepresentation claim. Indeed, the court conceded that, "apart from any issue as to Western's knowledge of the 1978 oral agreement," the plaintiff had presented only a "colorable claim" of intentional misrepresentation. *Id.* As this Court recently reaffirmed in *Liberty Lobby*, evidence which is "merely colorable" has never been sufficient to withstand summary judgment. *Liberty Lobby*, 106 S. Ct. at 2511.

In stark contrast to *Western Auto*, there was no allegation and no evidence in this action of an agreement to provide the tile dealers with advance notice of termination. Thus, the very linchpin of the plaintiff's case in *Western Auto* — the oral agreement — was not before the Ninth Circuit. Moreover, the courts were faced with distinctly different economic backdrops from which to gauge the parties' conduct. Western terminated its nearly exclusive relationship with its supplier in order to obtain cheaper or better goods from another manufacturer. Franciscan, on the other hand, was forced to terminate its non-exclusive relationships with the tile dealers due to uncontrollable and growing losses. Whereas Western apparently presented no evidence that the alleged fraudulent scheme was economically infeasible or implausible, Franciscan adduced significant evidence, as noted by the Ninth Circuit, that it had no economic incentive to mislead the tile dealers. Clearly, the Eighth and Ninth Circuits have not presented this Court with conflicting rulings on the inferences which reasonably may be drawn from the evidence when that evidence — as demonstrated above — was dissimilar in several material respects.[5]

[5]It is equally clear that the circuits do not conflict on what factual showing is necessary to establish a duty to disclose business decisions in the context of a supplier-retailer relationship. *Western Auto* did not interpret or apply federal law as it was exclusively concerned with Western's duty of disclosure under Missouri law. In any event, the tile dealers have not challenged the Ninth Circuit's opinion on this ground as they state that they "do not allege that Franciscan had a duty to disclose its business plans to its Dealers . . . ." (Petition at p. 25).

III.

The Ninth Circuit Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings In Affirming The District Court's Denial Of Leave To Amend.

As a third possible basis for jurisdiction, petitioners assert that the Ninth Circuit substantially departed from the "accepted and usual course of judicial proceedings" by affirming the district court's denial of leave to amend. Petitioners contend that the Ninth Circuit misconstrued the proposed amended complaint and failed, as a result, to consider the tile dealers' claim that Franciscan represented it had "a *plan* to remain open — i.e., that closure was not under consideration at all." (Petition, at pp. 24-25) (emphasis in original). By "plan," petitioners apparently mean that Franciscan promised to remain in business, regardless of sales or other contingencies.

The Ninth Circuit clearly considered — and rejected — the tile dealers' contention that Franciscan promised to remain in business at any cost through March of 1984. In this regard, the lower court was unequivocal: "[Franciscan] never explicitly promised to stay in business until a certain date. We are convinced that no reasonable trier of fact could infer a scheme to defraud from this evidence." *Franciscan*, 818 F.2d at 1471. "Only an incorrigible optimist could understand [Franciscan's statements] as either a promise to remain open without regard to sales or as a representation of sound economic health." *Id*.

Based on these findings, the Ninth Circuit was correct in holding that the trial court did not commit a clear error of judgment in denying leave to amend on the ground of futility. *See Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1331 (9th Cir. 1981). (Appellate court may not disturb the district court's decision in denying leave to

amend unless it has a definite and firm conviction that the district court committed a clear error of judgment.) In sum, the tile dealers have presented no valid basis for invoking this Court's jurisdiction.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 29, 1987

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 29, 1987, I served the within BRIEF IN OPPOSITION in re: "California Architectural Building Products, Inc. vs. Franciscan" in the United States Supreme Court, October Term 1987, No. 87-621;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Benjamin George Williams, Esq.
1550 Euclid Street
Santa Monica, CA 90404

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 29, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA